NO. 86399-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

LISA ANN BYRD,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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I. ISSUES

1. Whether the search of a purse found on an arrestee's lap contemporaneous with her arrest and removal from a motor vehicle, is a valid search incident to arrest of the person?

2. Whether this court should reject the Court of Appeals' extension of *Arizona v. Gant* beyond the context of a search of a motor vehicle, to a search of items associated with a person who has been arrested?

II. STATEMENT OF THE CASE

While on patrol on the evening of November 17, 2009, Officer Jeff Ely of the Yakima Police Department conducted a traffic stop of a maroon Honda Civic. He had determined that the license plate on the Honda was instead registered to an Acura Integra. He was further informed by his dispatcher that the owner of the Acura reported that the plates had been stolen. **(RP 4-5, 12)**

A male individual who had been driving the Honda indicated that the front seat passenger owned the car. She was identified as Lisa Ann Byrd. **(RP 5, 13)** Officer Ely arrested the driver on an outstanding warrant, then approached Ms. Byrd to take her into custody for possession of stolen property. **(RP 5, 13, 15)** The officer observed that she had a purse on her lap, and her hands were on the purse. **(RP 5-6, 10, 17)** As

she was removed from the vehicle, the officer took the purse out of her lap, and placed it outside the vehicle on the ground. He wanted to make sure that it was out of her control "because purses contain dangerous things to us". **(RP 6)**

After both the driver and Ms. Byrd were secured in a patrol vehicle, Officer Ely returned to the purse and searched it for any weapons or contraband "because it was coming with her to the jail because I had her under arrest for possession of stolen property." **(RP 6-7)** Inside the purse, the officer found items he recognized to be contraband: glass pipes and white baggies containing a white crystalline substance he recognized as methamphetamine as a result of his training. **(RP 7)**

III. STATEMENT OF PROCEDURE

Byrd was charged with a single count of possession of a controlled substance, methamphetamine, under Yakima County Superior Court cause number 09-1-02126-6. **(CP 38)**

She moved to suppress evidence obtained as a result of the search of her purse. **(CP 33-37)** After a hearing, the court granted the motion and suppressed the evidence, concluding that the search was unlawful under Arizona v. Gant, 556 U.S. ____, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), and State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009), and that the inevitable discovery doctrine did not apply with respect to what

would have been an impound inventory search. **(CP 7-10)** The case was dismissed. **(CP 10)** The State timely appealed. **(CP 2-6)**

Division III of the Washington State Court of Appeals affirmed the trial court, concluding that since Ms. Byrd had no way to access the purse at the time it was searched, the justifications for a search incident to arrest were not present, and the search consequently violated the Fourth Amendment. State v. Byrd, 162 Wn. App. 612, 617, 258 P.3d 686 (2011).

In its decision the Court of Appeals expressly overruled its prior decision in State v. Johnson, 155 Wn. App. 270, 229 P.3d 824, (2010) *review denied*, 170 Wn.2d 1006, 245 P.3d 227 (2011), in which the court held that Gant applied only to warrantless searches of vehicles incident to arrest.

IV. ARGUMENT.

1. **The search of the purse was justified as a search incident to arrest of Ms. Byrd, as the purse was on her person at the time of the arrest, and the officer's search for potential weapons or evidence of the crime of arrest was reasonable.**

It is well-established that warrantless searches are *per se* unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. Gant, 129 S. Ct. at 1716, *citing* Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

Among the exceptions to the warrant requirement is a search incident to arrest. Id. A search incident to arrest may lawfully extend to "the arrestee's person and the area within his immediate control" or those areas into which an arrestee might reach in order to grab a weapon or "evidentiary items." Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). *See, also,* Thornton v. United States, 541 U.S. 615, 626, 124 S. Ct. 2127, 158 L. Ed. 2d905 (2004).

The general exception for search incident to arrest has long been recognized, and has historically been formulated into two distinct propositions. First, search of a person by virtue of lawful arrest, and second, search of the area within the control of the arrestee. United States v. Robinson, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). The first is a search incident to arrest for evidence of the crime of arrest, the second is based upon exigent circumstances.

Long before Chimel and Robinson, Washington courts had recognized a valid search pursuant to lawful arrest, for evidence of the crime of arrest:

> It has always been held that a peace officer, when he makes a lawful arrest, may lawfully, without a search warrant, search the person arrested and take from him any evidence tending to prove the crime with which he is charged. If a search may be made of the person or clothing of a person lawfully arrested, then it would follow that a search may also be properly made of his grip or suit case, which he

> may be carrying. From this it seems to us to follow logically that a similar search, under the same circumstances, may be made of the automobile of which he has possession and control at the time of his arrest. This is true because the person arrested has the immediate physical possession, not only of the grips or suit cases which he is carrying, but also of the automobile which he is driving and of which he has control.
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> State v. Hughlett, 124 Wash. 366, 370, 214 P. 841 (1923), *overruled on other grounds,* State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1984).

A search incident to arrest is valid under the Fourth Amendment if:

1. The object searched was within the arrestee's control when he or she was arrested; and

2. If the events occurring after the arrest but before the search did not render the search unreasonable.

State v. Smith, 119 Wn.2d 675, 681, 835 P.2d 1025 (1992).

This court's prior decision in Smith is instructive. There, an officer arrested the defendant for consuming liquor in a public place. During the arrest, a fanny pack worn by the defendant fell to the ground. After placing the defendant in the back seat of her patrol car, the officer searched the bag and found marijuana, plastic baggies and a scale with cocaine residue on it. This search apparently occurred some 9 to 17 minutes after the arrest. State v. Smith, 119 Wn.2d at 677.

The Supreme Court first addressed whether the fanny pack was in Smith's control when he was arrested:

> An arrestee does not have to be in actual physical possession of an object for that object to be within his control for search incident to arrest purposes. In United States v. Fleming, 677 F.2d 602 (7th Cir. 1982), two suspects were carrying paper bags when police arrested them. During the 'excitement of the arrests', each suspect dropped his bag. Fleming, 677 F.2d at 606. The bags were on the ground next to the arrestee at the actual moment of arrest. Nonetheless, the Seventh Circuit ruled that the bags were in the arrestees' control at the time of arrest. Fleming, 677 F.2d at 607. Similarly, the District of Columbia Circuit has ruled that a suspect is in control of an object for the purposes of a search incident to arrest as long as the object is within the suspect's reach immediately prior to the arrest. *See*, United States v. Brown, 671 F.2d 585, 587 (D.C. Cir. 1982).
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> Id., at 681.

Second, the court addressed whether events occurring after the arrest, but before the search, made the search unreasonable. Relying upon the Ninth Circuit case of United States v. Turner, 926 F.2d 883 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 L. Ed. 2d 73, 112 S. Ct. 103 (1991), the determined that the search was reasonable in that, even though Smith was secured within the patrol car, he had tried to run away and disobeyed the officer's instructions:

> "[T]he fact that a suspect is handcuffed in the back of a police car when a search occurs does not necessarily make the search unreasonable. In Turner, the police arrested the suspect in one room, handcuffed him, and moved him to a different room. Turner, 926 F.2d at 888. The court found that the officers' action in removing the arrestee from the room prior to the search was a reasonable safety precaution, and that to hold otherwise could be to impose a rule "entirely at odds with safe and sensible police procedures." Turner,

926 F.2d at 888 (*quoting* United States v. Fleming, 677 F.2d 602, 607 (7th Cir. 1982).

Id., at 682-83.

The Smith court also relied, in part, upon a decision of the United States Supreme Court, which held that in the case of searches which are contemporaneous with an arrest, an officer's "exclusive control" of the item searched does not render the search unconstitutional. New York v. Belton, 453 U.S. 454, 462-63, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (1981).

This Court again applied Belton to facts involving a purse in State v. Fladebo, 113 Wn.2d 388, 779 P.2d 707 (1989). There, the defendant argued that a search of her purse after she was secured in a patrol car was unconstitutional, in that there was no longer any danger presented to the officers or the preservation of the evidence. The Court held that the search was not unreasonable since the defendant was not removed from the scene, and the search was close on the heels of the arrest. Id., at 397.

In 2009, the United States Supreme Court issued its opinion in Gant, significantly limiting the ability of law enforcement to conduct a warrantless search of a vehicle incident to arrest of an occupant. Such searches are limited to searches of a vehicle under the emergency exceptions for officer safety or to prevent the destruction of evidence where the occupant of the vehicle is handcuffed and secured in a patrol

car. Also, the decision added what it referred to as a new exception to the warrant requirement permitting officers to search a vehicle for evidence of the "offense of arrest". Id., 129 S. Ct. at 1723.

A similar analysis under the Washington State Constitution was adopted subsequently in State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) and State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009):

> Today we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.
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> Id., at 394-95.

Here, however, Officer Ely did not search the vehicle in which Ms. Byrd was a passenger, but a purse which she was holding on her person at the very moment she was arrested. As the officer testified, the purse was going to the jail with Ms. Byrd, and as purses could potentially contain "dangerous things", the search was justified in order to maintain the safety of the officer and others involved in the booking process. Two individuals from the vehicle had been taken into custody, and all, including the purse, were going to be transported. This is in contrast to the vehicle, which could be safely secured and moved by itself after the arrest. Therefore, the search meets the two-pronged test of Chimel and Smith: the purse was

under her control when Ms. Byrd was arrested, and the officer's contemporaneous search was not unreasonable. The officer returned to retrieve the purse from the ground after securing Ms. Byrd and the driver, he did not retrieve it from within the vehicle.

Apart from making sure that the purse did not contain weapons, the purse could well have yielded evidence of the crime of arrest, as pointed out in Judge Brown's dissent, Ms. Byrd was arrested for possession of stolen property; vehicle ownership and license documents could have been found within the purse. Byrd, 162 Wn. App. at 617, (Brown, J., dissenting).

2. The Court of Appeals extension of Gant beyond the context of vehicle searches should be rejected by this court.

Prior to Byrd, Division III had held in another case that Gant applies only to warrantless vehicle searches incident to arrest. State v. Whitney, 156 Wn. App. 405, 409, 232 P.3d 582 (2010). The court on that occasion was persuaded that "[O]nce arrested there is a diminished expectation of privacy of the person which includes personal possessions closely associated with the person's clothing." Id.

In Whitney, the defendant had been arrested for driving while his license was suspended. Subsequent to a search incident to arrest, prescription medications were found in his pocket. Id.

Some other courts have since determined that Gant should be limited only to warrantless vehicle searches incident to arrest. In United States v. Brewer, the Eighth Circuit, having noted that pursuant to Robinson, a search incident to person "requires no additional justification", observed that "[T]he search of a vehicle is different, however-the Supreme Court held in Gant that '[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.'" United States v. Brewer, 624 F.3d 900, 905 (8th Cir. 2010), *cert. denied* 131 S. Ct. 1805 (2011), *quoting* Gant, 129 S. Ct. at 1723.

The arrestee in Brewer had been arrested for driving with a suspended license, and prerecorded buy money from an undercover operation was recovered from his person. Id., at 903.

A different panel in the Eighth Circuit reached a similar conclusion in United States v. Perdoma, 621 F.3d 745 (8th Cir. 2010), *cert. denied,* ___ S. Ct. ___ (2011). In that case, the

defendant moved to suppress a search of a bag which had been dropped at his feet after he was arrested in a bus terminal. He was handcuffed, but remained a few feet away from the bag while it was searched. Though the case did not involve a vehicle, the defendant raised Gant, and the federal court declined the invitation to apply it: "[W]hile the explanation in Gant of the rational for searches incident to arrest may prove to be *instructive* outside the vehicle-search context in some cases, we agree with the Government that this is not such a case." Id., at 751 (emphasis added).

It should be noted that the Third Circuit has declined to read Gant so narrowly as to only apply to vehicle searches: "we do read Gant as refocusing our attention on a suspect's ability (or inability) to access weapons or destroy evidence at the time a search incident to arrest is conducted." United States v. Shakir, 616 F.3d 315, 318 (3rd Cir. 2010), *cert. denied* ___ S. Ct.___ (2010). The court, however, affirmed the denial of the defendant's motion to suppress the results of a search of a gym bag which was in his possession at the time of his arrest.

As the purse was associated with Ms. Byrd's person at the time she was arrested, and the search by the officer was reasonable, and the search was reasonable, the search was a valid search incident to arrest. Further, this court should held that the application of Gant should be limited to warrantless searches of vehicles incident to arrest.

V. CONCLUSION

Based upon the foregoing arguments, this Court should reverse the Court of Appeals, and remand this matter back to the trial court for further proceedings.

Respectfully submitted this 25th day of January, 2012.

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, vs. LISA ANN BYRD, Respondent.	)	NO. 86399-7 SWORN STATEMENT OF SERVICE BY MAIL

I, Elaine Chartrand, state that I am and was at the time of the service of the Supplemental Brief of Petitioner, herein referred to, a citizen of the United States, residing at Yakima, Yakima County, Washington; that I am over the age of twenty-one years and am not a party to the within entitled action.

That on the 25th day of January, 2012, I served upon Susan Marie Gasch, P O Box 30339, Spokane, WA 99223-3005, Attorney for Respondent a copy of the aforementioned instrument, by putting the same, enclosed in sealed envelopes, postage paid, into the post office.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Elaine Chartrand
January 25, 2012
at Yakima, WA